X I-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

H.F.R.
23/02/06

आदेश पत्रक

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विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Dhirendra Mishra, JJ.

23-2-2006

Mr. Shailendra Dubey, counsel for appellant No.1 Ganesh Ram.

Mr. R.K. Jain, counsel for appellant No.2 Budhnath.

Mr. U.N.S. Deo, Additional Public Prosecutor with Mr. Akhil Mishra, Panel Lawyer for the State/respondent.

Oral judgment dictated on *Dais*.

Per L.C. Bhadoo, J: -

By this appeal under Section 374 (2) of the Code of Criminal Procedure, the accused/appellants have questioned legality & correctness of the judgment of conviction and order of sentence dated 1st May, 1999, passed by the 1st Additional Sessions Judge, Raigarh, in Sessions Trial No.210/96, whereby learned Additional Sessions Judge after holding the accused/appellants guilty for commission of offence under Sections 302 and 325 read with Section 34 of the Indian Penal Code, sentenced each of them to undergo imprisonment for life and rigorous imprisonment for one year, respectively. It was further directed that both the sentences shall run concurrently.

Case of the prosecution, in brief, is that Mansai (PW-1) lodged merg intimation (Ex.P-2) in Police Station: Bagbahar on 14-6-1996 at 2230 hours to the effect that land dispute was going on between him and Sukhram, on that day Sukhram was sowing paddy in his field, therefore, thinking that he

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IN THE HIGH COURT OF JUDICATURE AT JABALPUR

CRIMINAL APPEAL NO. 502 OF 1999

APPELLANTS: ACCUSED IN JAIL

1. Ganesh Ram, s/o Sukhram aged about 38 years, r/o Birim dega.

2. Budhnath s/o Sukhram aged about 23 years, r/o village Birim dega.

Police Station Bag Bahar
Distt.RAIGARH(M.P.).

VERSUS

RESPONDENT: State of M.P. through Station House Officer Police Station Bag Bahar Distt.RAIGARH(MP).

CONVICTION	SENTENCE
u/s 302 & 325 read with 34 of I.P.C.	Life Imprisonment with 1 year of rigorous imprisonment commulative.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CRIMINAL PROCEDURE CODE

by Shri R.D. Rao Advocate

Rs. A.R.

Petition with Annexures

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should not plow his field, he went to saw the field and he asked him not to sow paddy on which Ganesh, Buna, Aghni & Sukhram started attacking with axe. Bhagatram, Sobha & Heeralal came to intervene. Ganesh Ram assaulted Heeralal with Tangi on right scapular region as a result of which he died. Based on this report, Station House Officer B.L. Kehri (PW-10) registered the First Information Report (Ex.P-1) for commission of offence under Sections 302 & 323 read with Section 34 of the I.P.C. and sent the injured persons namely, Mansai, Sobharam & Bhagatram to Civil Dispensary, Bagbahar, for examination of the injuries sustained by them. Dr. K.D. Paswan (PW-4) examined them and prepared the injury reports Ex.P-3 of Mansai, Ex.P-4 of Sobharam & Ex.P-5 of Bhagatram, and for certain injuries X-Ray was advised. After receiving X-Rays, it was found that all the three received fractured injuries, therefore, reports of fractures in respect of Mansai Ex.P-6, Sobharam Ex.P-7 & Bhagatram Ex.P-8 were prepared. Notice Ex.P-20 was given to the Panchas and thereafter, Panchanama (Ex.P-21) of the body of Heeralal was prepared. Blood stained soil and plain soil were taken into possession from the place of occurrence under Ex.P-9. While in policy custody, accused Ganesh Ram gave memorandum Ex.P-10 in respect of axe, the weapon of offence and in pursuance of that, axe was recovered under Ex.P-11. Accused Budhnath gave memorandum Ex.P-12 and in pursuance of that, bamboo Lathi was recovered under Ex.P-13. Site plan (Ex.P-15) of the place of occurrence was prepared by Patwari Raghunath Ram. The body of deceased Heeralal was sent for post-mortem examination to Primary Health Centre, Pathalgaon under Ex.P-16A, where Dr. J. Minj conducted post-mortem on the body of Heeralal and prepared the post-mortem report (Ex.P-16).

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Site plan (Ex.P-18) of the place of occurrence was prepared by B.L. Kehri. Clothes of the deceased were taken into possession under Ex.P-19.

After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Dharamjaigarh, for commission of offence under Sections 302 & 325 read with Section 34 of the I.P.C. against accused persons Ganesh Ram, Budhnath, Sukhram & Aghnibai, who in turn committed the case to the Sessions Judge, Raigarh, from where learned 1st Additional Sessions Judge, Raigarh, received the case on transfer for trial.

The prosecution in order to establish charges against the accused persons examined 11 witnesses. On the other hand, statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the prosecution evidence and stated that they are innocent, in their defence they examined one witness Sukul (DW-1). During cross-examination, documents Exs.D-1 to D-5 regarding charge sheet and connected papers filed in the counter case against the complainant party were tendered into evidence and the Roznamcha report (Ex.D-6) regarding the report lodged by the accused party against the complainant party was also tendered into evidence.

After hearing the arguments of Additional Public Prosecutor and counsel for the accused persons, learned Additional Sessions Judge convicted accused/ appellants Ganesh Ram & Budhnath as mentioned in para 1 of this judgment, whereas acquitted accused persons Sukhram & Aghnibai of charges under Sections 302 & 325 read with Section 34 of the I.P.C.

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We have heard Mr. Shailendra Dubey, learned counsel for appellant No.1 Ganesh Ram; Mr. R.K. Jain, learned counsel for appellant No.2 Budhnath and Mr. U.N.S. Deo, learned Additional Public Prosecutor with Mr. Akhil Mishra, learned Panel Lawyer on behalf of the State/respondent.

The homicidal death of Heeralal is not in dispute. Even the injuries sustained by Sobharam, Mansai & Bhagatram in the incident in question are also not in dispute.

Mr. Shailendra Dubey, learned counsel for appellant No.1 Ganesh Ram, argued that the trial Court has committed error in law by not accepting the plea of the accused that Sukhram along with the accused/appellants were in their agricultural field, Mansai & others came and started quarreling with them, they prevented them from doing their agricultural operations in the field and the complainant party were the aggressors. In the right of private defence, the accused persons in order to defend themselves might have caused injuries to Heeralal & others, but that was done in the right of private defence. Therefore, the accused has been wrongly held guilty for commission of offence under Sections 302 & 325 read with Section 34 of the I.P.C. He further argued that even the accused party received injuries and those injuries have not been explained. Sukhram received grievous injury of fracture and Aghnibai, Ganesh Ram & Budhnath also received injuries and in that respect charge sheet has also been filed against the complainant party which is pending in the Court of Judicial Magistrate, Dharamjaigarh. Copy of charge sheet filed against the complainant party along with the injury report sustained by the accused party has been filed

which is Ex.D-1 and report of that matter was lodged at Police Station: Bagbahar, which is evident from Roznamcha report Ex.D-6.

Mr. R.K. Jain, learned counsel for appellant No.2 Budhnath, argued that from the evidence of prosecution witnesses it is not established that the accused was in any way involved in the crime in question and he assaulted with Lathi to anyone person of the complainant party. Even in the merg intimation given by Mansai no criminal act has been assigned to accused/appellant Budhnath, therefore, he has been wrongly convicted for commission of offence under Sections 302 & 325 with the aid of Section 34 of the I.P.C.

On the other hand, Mr. U.N.S. Deo, learned Additional Public Prosecutor with Mr. Akhil Mishra, learned Panel Lawyer supported the judgment of the trial Court.

'Right of private defence' is not defined. Section 96 of the Indian Penal Code enumerates that nothing is an offence, if it is done in exercise of the right of private defence. Section 97 deals with the subject-matter of private defence of the body and of property. It, however, extends not only to person exercising the right; but to any other person. The right may be exercised in the case of any offence against the body and in the case of offences of theft, robbery, mischief or criminal trespass and attempts at such offences in relation to property. Sections 96 and 98 confer a right of private defence against certain offences and acts. Section 99 lays down the limit therefor. The right conferred upon a person in terms of Section 96 to 98 and 100 to 106 is controlled by Section 99. In terms of Section 99 of the Indian Penal Code, the

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right of private defence, in no case, extends to inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 provides that the right of private defence of the body extends under the restrictions mentioned in the last preceding section to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions enumerated therein, namely, "First - Such an assault, as may reasonably cause the apprehension that death will otherwise be the consequence of such assault; Secondly - Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault". To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden in this behalf is on the accused.

Sections 102 and 105 I.P.C. deal with commencement and continuance of the right of private defence of body as well as property. It commences as soon as the reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed, but not until there is reasonable apprehension. In other words, the right lasts so long as the reasonable apprehension of the danger to the body continues.

So far as exercise of right of private defence of property extended to causing death is concerned, the same is covered by Section 103 of the Indian Panel Code. Such a right is available if the offence, the commission of which, or

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the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions enumerated, viz., robbery, house-breaking by night, mischief by fire committed on any building, theft, mischief or house-trespass.

Section 104 provides that in relation to the offences as enumerated in Section 103, the right of private defence can be exercised to the voluntary causing to the wrong doer of any harm other than death. Section 105 provides for commencement and continuance of the right of private defence of property.

Section 105 of the Indian Evidence Act casts the burden of proof on the accused who sets up the plea of self-defence and in the absence of proof, it may not be possible for the Court to presume the correctness or otherwise of the said plea. No positive evidence although is required to adduced by the accused; it is possible for him to prove the said fact by eliciting the necessary materials from the witnesses examined by the prosecution. He can establish his plea also from the attending circumstances, as may transpire from the evidence led by the prosecution itself.

Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on

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the basis of the material on record. In the matter of **Salim Zia vs. State of U.P.** reported in **AIR 1979 SC 391**, the Apex Court held that

> "It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence."

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. In **Lakshmi Singh vs. State of Bihar** reported in **AIR 1976 SC 2263**, the Apex Court held that

> "A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting."

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The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In **Jai Dev vs. State of Punjab** reported in **AIR 1963 SC 612**, it is held that "as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or put to route, there can be no occasion to exercise the right of private defence".

The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. In **Vidhya Singh vs. State of M.P.** reported in **AIR 1971 SC 1857**, it is held that

> "Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances."

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In the matter of **Sekar alias Raja Sekharan vs. State represented by Inspector of Police, T.N.** reported in **(2002) 8 SCC 354**, the Apex Court has observed that

> "in order to find whether right of private defence is available or not, the injuries receives by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities or all relevant factors to be considered".

In **Laxman Singh vs. Poonam Singh and others** reported in **2003 AIR SCW 4566**, the Apex Court held that

> "where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record".

The right of private defence cannot be claimed when the accused is aggressor. In the matter of **Butta Singh vs. The State of Punjab** reported in **AIR 1991 SC 1316**, the Apex Court held that

> "a person who is apprehending death or bodily injury cannot weight in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to

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expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private-defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negatived."

In case, if a defence is made out, the accused is entitled to be acquitted and if not he will be convicted of murder. But in case of use of excessive force, he would be convicted under Section 304 of the I.P.C. However, the right of private defence cannot be claimed when the accused is aggressor.

In the light of the above principles of law, now we have to scrutinize the evidence available on record in the instant case.

Mansai (PW-1), the injured witness, gave merg intimation (Ex.P-2) on 14-6-1996 at 2230 hours in which he had mentioned that a land dispute is going on between him and Sukhram. On that day Sukhram was sowing paddy in his field

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and thinking that he should not sow paddy by plowing his field, he went to see the field. He asked Sukhram not to sow paddy on which Ganesh, Buna, Aghni & Sukhram started assaulting with axe and when Bhagatram, Sobha & Heeralal came to intervene, Ganesh attacked Heeralal with axe, which landed on the left side of back portion below the armpit, and Heeralal died. In the Court evidence, Mansai stated that on Friday when he went to the agricultural field, at that time, Ganesh Ram attacked Heeralal with axe, which landed on the left side of back portion. Ganesh Ram also assaulted him on the back portion as a result of which he fell down, when his son Bhagatram came Ganesh Ram assaulted him also with the axe and Budhnath assaulted with Lathi. Thereafter, when Sobharam came he was assaulted with axe on right hand and when his brother Heeralal reached there, accused Budhnath assaulted him with Lathi on his head as a result of which he fell down and accused Ganesh assaulted with axe on left side of back portion. Heeralal succumbed to the injuries. In cross-examination, Mansai (PW-1) has stated that it is correct to say that he is cultivating the agricultural land, which came to his share in partition. How much land came in the share of Sukhram in partition he does not know? It is incorrect to say that Sukhram has filed any suit regarding partition in the Dharamjaigarh Court. It is incorrect to say that a case against them is pending in the Court of Judicial Magistrate, Dharamjaigarh, under Sections 325, 323 & 325 read with Section 34 of the I.P.C. In cross-examination, he has further stated that his son has not assaulted Sukhram, as Sukhram was not present on the scene of occurrence. Aghnibai was present in the field and there was an injury caused by axe on her head, how she received that injury and who caused that injury he does not know.

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Bhagatram (PW-2) has stated in his evidence that Ganesh, Aghnibai, Budhram & Budhna were plowing their field, his father (Mansai - PW-1) went to that side and then accused Budhna & Ganesh assaulted his father with axe. Ganesh attacked with axe on backside when he, his brother Sobha & Heeralal came, the accused persons assaulted Heeralal. Budhna assaulted with Lathi on back portion as a result of which Heeralal fell down and Ganesh attacked Heeralal with axe. In cross-examination, he has admitted that it is correct to say that Ganesh & Budhnath were plowing their field, Sukhram was in his field and by that time, he was not able to start plowing. Aghnibai was also present in the field. It is correct to say that dispute of land is between them and the accused persons. He further stated that whether Sukhram & Aghnibai received any injury or not, he does not know. It is incorrect to say that criminal case is pending against him, his father & brother and at the same time, he stated that accused persons have falsely implicated them. He had not seen broken hand and head of Sukhram. Whether Aghnibai received any injury on head and who assaulted that injury he does not know, he had not seen any injury on head and body of Ganesh.

Sobharam @ Lili (PW-3) has stated in his evidence that Ganesh assaulted his father Mansai and when Bhagat went there, Ganesh assaulted him also with axe and thereafter Ganesh Ram assaulted him also with the axe. Thereafter, when Heeralal went there Ganesh Ram assaulted him also with axe. When Ganesh assaulted him (PW-3), he ran way. Budhnath assaulted Heeralal with Lathi. In cross-examination, para 2, he has stated that there was no dispute

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between them and the accused persons, accused persons were plowing their own field and they were not plowing the field which belongs to them. All of them did not went to obstruct the accused from plowing the field. It is correct to say that hand & head of Sukhram were broken. The head of Aghnibai was also broken. Whether Ganesh Ram & Budhnath received any injury or not, he does not know. How the accused persons received injury, he does not know. Whether any case is pending in the Dharamjaigarh Court against them, he does not know.

Therefore, Bhagatram (PW-2) & Sobharam (PW-3) have admitted in cross-examination that the accused persons were plowing their own field and they had not plowed the field belonging to the complainant party. The accused party was already present in the field, in the first instance, Mansai and other accused persons (complainant party) went there and in that process, accused Sukhram & Aghnibai received injury. This fact has been admitted by these witnesses (PW-2 & PW-3).

Perusal of the copy of charge sheet (Ex.D-1) filed against the complainant party, which relates to the case pending against the complainant party, also shows that injuries were sustained by the accused persons and injury reports are there. Even the report (Ex.D-6) was lodged by the accused party, on the same day, at Serial No.381 in Police Station: Bagbahar, in which it has been mentioned that the complainant party assaulted the accused party and in which they sustained injuries. It is not a case where the accused party sustained simple injuries. Fractures were sustained by Sukhram, Aghnibai received injury

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on head and appellant No.1 Ganesh Ram also received injuries which were simple in nature.

Ajay Shanker Tripathi (PW-11), Sub Inspector, has also stated that Sukhram received fracture injury. Even Dr. K.D. Paswan (PW-4), who examined the complainant party, in para 6 of his evidence, has stated that he examined the injuries of Budhnath, Ganesh Ram, Sukhram & Aghnibai. Site plan (Ex.P-18) was prepared by the Investigating Officer in which place of occurrence has been shown as No.1 where the field of Sukhram has been shown and on which Mansai sown paddy.

Therefore, from the above evidence, in cross-examination of the prosecution witnesses it has come on record that the accused party were not plowing the field of complainant party, Mansai and complainant party went after the accused party were already in the field and they started quarrelling in which both the parties sustained injuries. Even Sukhram, Aghnibai, Ganesh Ram and the accused persons also received injuries. Ganesh Ram received injuries. In the circumstances, in the above facts, Ganesh Ram attacked Heeralal in the right of private defence.

Now the question arises as to whether Ganesh Ram had exceeded the right while exercising the right of private defence by attacking Heeralal with axe on vital parts of his organs. It is evident from the evidence that Ganesh Ram attacked Heeralal with axe and in cross-examination, it has not come that Heeralal in any way attacked Ganesh Ram. The defence has not been able to probabilise the version of the right of private defence i.e. the complainant party

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आदेश पत्रक

मामला क्रमांक G.A.1502/99 सन् ~~200~~

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -16-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

in any way attacked the accused party with any dangerous weapon like axe. In the right of private defence, accused Ganesh Ram was to exercise the right of private defence to the extent of warding off the attack or for forestalling the attack from the side of the complainant party. It has come in the evidence that when Heeralal fell down and there was no reasonable apprehension that in lying condition Heeralal was going to attack the accused party, at that stage, Ganesh attacked on the backside of Heeralal with the axe which was, at that moment, not necessary to attack Heeralal in order to protect himself or the accused party. Therefore, it is evident that accused Ganesh Ram exceeded the right of private defence in attacking Heeralal with axe on the vital organs of his body.

In the circumstances, Ganesh Ram can be imputed with the intention to cause such fatal injury as was likely to cause death, if not the intention of causing death and hence, it would be appropriate to convict accused/appellant No.1 Ganesh Ram under Part-I of Section 304 of the I.P.C. As far as the other injuries caused by accused Ganesh Ram to Mansai, Sobharam & Bhagatram and thereby committing the offence under Section 325 of the I.P.C. is concerned, same cannot be said to be exceeding the right of private defence. Therefore, his conviction under Section 325 of the I.P.C. is not based on sound reasoning and legal evidence, and same cannot be sustained.

Now coming to the part played by accused/appellant No.2 Budhnath, the evidence of prosecution witnesses as mentioned is that Budhnath assaulted Heeralal with Lathi as a result of which he fell down and thereafter Ganesh Ram assaulted Heeralal with axe. As per the post-mortem report and medical

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मामला क्रमांक G.A. 1502/99 सन् ~~200~~

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -17-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

evidence of Dr. J. Minj (PW-9), Heeralal received only one incised wound on the right side of back portion in the size of 3" x ½" x deep up to the bone, except this injury there was no injury on the body. As a result of this injury, 5th, 6th & 7th ribs were fractured and vessels were found cut. In cross-examination, he has stated that the injury found on the body of the deceased could not have been sustained by the Lathi and the Lathi was recovered from accused/appellant No.2 Budhnath. Therefore, by this medical evidence the prosecution case that accused Budhnath assaulted deceased Heeralal with Lathi stands belied. Moreover, in the merg intimation (Ex.P-2), it has been mentioned that Budhnath assaulted with axe to Mansai, but no axe has been recovered from him at his instance and in this report it has not been mentioned that Budhnath in any way assaulted Heeralal. Mansai (PW-1) has not stated in his examination-in-chief that Budhnath assaulted him, he has stated that Budhnath assaulted Heeralal and same has not been mentioned in the F.I.R. and also as per medical evidence, no injury caused by Lathi was found on the body of Heeralal. Mansai has further stated that Budhnath assaulted Bhagatram with Lathi, whereas, Bhagatram (PW-2) has not stated that Budhnath assaulted him with Lathi. Similarly, Sobharam (PW-3) has not stated that Budhnath assaulted him, but he has stated that Budhnath assaulted Heeralal with Lathi, whereas, same has not been found correct.

Therefore, in view of the above evidence, involvement of accused Budhnath in assaulting any of the injured persons namely, Mansai, Bhagatram, Sobharam, or deceased Heeralal has not been established. In the

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

circumstances, against him the prosecution has not been able to establish the crime. Hence, his conviction under Sections 302 & 325 read with Section 34 of the I.P.C. cannot be sustained, as same is not based on any legal and clinching evidence.

In the result,

1. The appeal in respect of accused/appellant No.2 Budhnath succeeds and the same is allowed. Conviction and sentence imposed upon him under Sections 302 & 325 read with Section 34 of the I.P.C. are set aside and he is acquitted of those charges. He be set at liberty forthwith, if not required in any other case.
2. The appeal in respect of accused/appellant No.1 Ganesh Ram partly succeeds and the same is partly allowed. Conviction and sentence imposed upon him under Sections 302 & 325 read with Section 34 of the I.P.C. are set aside and he is also acquitted of those charges, instead thereof he is convicted under Part-I of Section 304 of the I.P.C. and sentenced to undergo rigorous imprisonment for nine years. It is stated that the accused is in custody since June, 1996, thereby he has already undergone the sentence imposed upon him, which has not been disputed by learned Panel Lawyer. He be also set at liberty forthwith, if not required in any other case.

In view of this order, M.(Cri.)P.No.1633/2004 stands disposed of.

Parties are entitled for certified copy of this order.

Sd/-
L.C. Bhadoo
Judge

Sd/-
DHIRENDRA MISHRA
Judge

Soma 8/3/06